



Federal Communications Commission
Washington, D.C. 20554

May 31, 2005

DA 05-1387

Buddy C. Stanley
ITV, Inc.
12742 Hamilton Crossing
Carmel, IN 46032

Re: Call Sign KIVD0011

Dear Mr. Stanley:

This letter is in response to a renewal application, substantial service showing, and request for waiver of the substantial service and construction requirements of sections 95.831 and 95.833, respectively, of the Commission's rules¹ for Station KIVD0011, filed by ITV, Inc. (ITV) on March 12, 2004.² For the reasons set forth below, we reject ITV's substantial service showing, deny its waiver request, and dismiss its renewal application.

By way of background, on March 28, 1994, through the lottery process, the Commission granted ITV authorization to operate in the 218-219 MHz service (formerly the Interactive Video and Data Service (IVDS)) in San Francisco, CA and Oakland, CA under call sign KIVD0011. Pursuant to the Commission's rules in effect when this license was granted, stations must be placed into operation within five years from the date the license was granted.³ Moreover, unless an extension of time to construct was granted, the authorization would terminate automatically if the construction and operation deadlines were not met.⁴ In September 1999, the Commission eliminated the three- and five-year construction benchmarks, extended the term of all 218-219 MHz service licenses to ten years from the date of their license grant, and adopted a "substantial service" showing to be assessed at the expiration of the license term as a condition for renewal.⁵ Accordingly, ITV was required to provide substantial service within the service area by March 28, 2004.

¹ See 47 C.F.R. §§ 95.831, 95.833.

² ULS File No. 0001654409. Report of Substantial Service; Contingent Request for Partial Waiver of Sections 95.831 and 95.833 of the Rules, filed by ITV, Inc. on March 12, 2004 (ITV Renewal Request).

³ The Commission adopted the five-year license term in the *1992 Allocation Report and Order* in the context of awarding licenses by lottery "to reduce any potential for trafficking in licenses by persons who have no real interest in constructing," and as "consistent with the license term used in most other private radio services." In the Matter of Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data services, GEN Docket No. 91-2, *Report and Order*, 7 FCC Rcd 1630, 1641 (1992) (*1992 Allocation Report and Order*), *on recon.*, *Memorandum Opinion and Order*, 7 FCC Rcd 4923 (1992), *further recon.*, *Second Memorandum Opinion and Order*, 8 FCC Rcd 2787 (1993). The five-year license term conformed to the five-year license term of the General Mobile Radio Service, 47 C.F.R. § 95.105, and the Personal Radio Service under which the 218-219 MHz service is classified, 47 C.F.R. § 95.1(c).

⁴ See 47 C.F.R. §§ 1.946, 1.955.

⁵ See In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, RM-8951, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999).

In its license renewal request, ITV states that it has spent more than \$1.25 million in developing 218-219 MHz service equipment, business models, and end-user applications.⁶ ITV further states that although no transmitters are currently operational in its system, ITV has identified and arranged for cell transmitter station (CTS) space in central San Francisco, CA, which would permit 218-219 MHz service to be provided to the central portion of the San Francisco, CA – Oakland, CA market. ITV requests that we deem its \$1.25 million investment in developing its 218-219 MHz service to be “substantial service” within the meaning of sections 95.831 and 95.833 of the Commission’s rules. In the alternative, ITV requests a waiver of those rules so that it may continue its “development efforts” in the 218-219 MHz service.

ITV’s substantial service showing. Section 95.831 of the Commission’s rules states that, subject to the initial construction requirements of section 95.833, each 218-219 MHz service system licensee “must demonstrate that it provides substantial service within the relevant service area. Substantial service is defined as a service that is sound, favorable and substantially above a level of service which might minimally warrant renewal.”⁷ ITV states that it has spent more than \$1.25 million related to its 218-219 MHz service license, but concedes that no transmitters are currently operational. ITV also claims that it has “arranged” for transmitter space within its authorized market, although it has not yet been able to develop a business model that would permit it to operate on a self-sustaining basis. We are not persuaded by ITV’s arguments. By its own admission, and in consideration of the facts before us, ITV does not provide 218-219 MHz service in the San Francisco, CA – Oakland, CA market. We therefore cannot conclude that it has met the requirements prescribed in sections 95.831 and 95.833 to minimally warrant a renewal of its license for Station KIVD0011.⁸ Moreover, because section 95.833 of the Commission’s rules requires that each 218-219 MHz service licensee make a showing of “substantial service” within ten years of the license grant,⁹ we also determine that ITV’s license for Station KIVD0011 terminated automatically on March 28, 2004.¹⁰

ITV’s waiver request. Pursuant to section 1.925 of the Commission’s rules, a waiver may be granted if it is shown that: 1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that grant of the requested waiver would be in the public interest; or 2) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹¹ ITV states that development of a nationwide 218-219 MHz service is required in

⁶ *Id.*

⁷ 47 C.F.R. § 95.831.

⁸ See San Francisco IVDS, Inc., *Memorandum Opinion and Order*, 20 FCC Rcd 1960 (2005) (reinstating and renewing a 218-219 MHz service license where the licensee failed to renew its license in a timely fashion because it was actually offering service to customers at the time its license expired).

⁹ 47 C.F.R. § 95.833(a).

¹⁰ In this connection, we note that, pursuant to section 95.833(c) of the Commission’s rules, ITV will not be eligible to apply for 218-219 MHz service licenses for three years from the date the Commission takes final action affirming that its 218-219 MHz service license has been canceled. 47 C.F.R. § 95.833(c).

¹¹ See 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3 of the Commission’s rules, the Commission has authority to waive its rules if there is “good cause” to do so. 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

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order to generate the mass-market economies of scale and sufficient demand to make its efforts successful. ITV requests that it be given an undetermined amount of time to “continue its development efforts.” ITV presents no argument demonstrating how application of the sections 95.831 and 95.833 here would frustrate the underlying purpose of these rules. On the contrary, we believe that a grant of ITV’s waiver request would subvert the Commission’s overall policy goals to promote the rapid development of viable 218-219 MHz services. Moreover, ITV presents no unique or unusual factual circumstances that would warrant a waiver consistent with the public interest. The waiver request is hereby denied.

Accordingly, for the reasons stated herein, pursuant to sections 1.925, 1.955 and 95.831 of the Commission’s rules, 47 C.F.R. §§ 1.925, 1.955 and 95.831, we reject ITV’s substantial service showing, deny its waiver request, and dismiss its renewal application. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131 and 0.331.

Sincerely,

Katherine M. Harris
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau